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IN THE

Supreme Court of the United States

October Term, 1979
No. 79-1150

THE STATE OF CALIFORNIA, acting by and through the Department of Transportation and CALNEV PIPE-LINE COMPANY, a Corporation,

Petitioners,

vs.

DORIA MINING AND ENGINEERING CORPORATION, a Corporation, CECIL D. ANDRUS, etc., *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

PETITIONERS' REPLY MEMORANDUM.

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Preliminary Statement.

Respondent Doria's attempt to obtain in the district court a *de novo* trial of the administrative hearing under the guise of fraud and perjury is well shown by the thrust of its Opposition to the Petition herein. In implementation of such attempt Doria sets forth matters outside the administrative record, and matters irrelevant to Doria's charges of fraud and perjury in the mining contest allegedly adduced from Schroter's testimony. For example, at page 3 of its brief, Doria alleges discovery of the purported mining of one million

tons of road-building material from the claims by the State's contractor for the construction of Interstate 15, as shown by certain aerial photographs. Doria fails to explain what the material was actually used for, or how estimates of tonnage could be made from examination of aerial photographs.[1]

Unaccountably, Doria attaches as an Appendix to its brief the Petition dated May 5, 1978 presented by Doria to the Secretary of Interior for a rehearing of the validity contest. This Petition was presented while the appeal was pending before the Ninth Circuit Court of Appeals. Said Petition was not part of the record in the District Court, nor in the validity contest. It presents matters well beyond the alleged fraud and perjury urged in the District Court. It reargues the merits of Doria's case in the contest proceeding; it reargues the weight and credibility of evidence adduced before the Administrative Law Judge and reviewed by the IBLA. As such, it is the administrative counterpart of a motion for new trial. Being wholly outside the record on appeal, it merits no consideration by this Court.

I

Only the Test Results Shown in Exhibit 14-A Were Challenged by Doria, and Not Petitioners' Testimony as a Whole.

In reply to Petitioners' contention that the alleged fraud involved only the test results on samples taken by Mr. Schroter, Doria asks at page 5 of its brief

[1]A motion to reopen the validity contest was in fact made by Doria on the ground of new discovery of this information but, as indicated in the IBLA opinion, was denied as irrelevant to showing continuous marketability of materials, even if true. See Petition, App. "C," pp. 39-40.

". . . who is to say that the whole raft of evidence which petitioner claims 'as a whole reveals no discovery of valuable minerals' was not also tainted by fraud or perjury?" The answer is that Doria in the district court focused its attack only on Schroter's testimony regarding the test results as tabulated in Exhibit 14-A, and the laboratory test sheets on which said Exhibit was based.

The Ninth Circuit Court of Appeals indeed held that the merits of Doria's motion to amend its Complaint should be considered by the district court. However, Doria's motion to amend was predicated only on the alleged fraudulent nature of Schroter's testimony in connection with Exhibit 14-A. In the Points and Authorities attached to Doria's motion to amend, it was pointed out that Doria obtained "for the first time" copies of the laboratory test sheets and that:

> "Upon a review of these test sheets plaintiff has become aware, for the first time, and it has become apparent, that the exhibits placed into evidence by the defendants at the department hearing, which allegedly set forth the test results obtained by the State laboratory substantially vary and differ from the actual test sheets prepared by the State laboratory. In addition the test results, as set forth on such exhibits, materially distort the test result found and findings made by the State laboratory." (Points and Authorities in Support of Notice of Motion and Motion for Leave to Amend Complaint, CR 364, lines 15-30.)

The affidavit of James M. Muir, filed in support of the motion, also specified the laboratory test sheets as the basis of uncovering the alleged fraud in reporting the test results. (CR 369-371.)

From the foregoing it is evident that Doria's attack was limited to a specific item of evidence and testimony relating thereto, and not to a "whole raft of evidence" presented at the administrative hearing. Petitioners reiterate that the body of evidence, reviewed in detail in the IBLA decision, is sound and unaffected by the alleged "cancer" of Exhibit 14-A.

II

Doria Reargues the Weight of Evidence at the Contest Hearing, and Misreads the Ninth Circuit Opinion.

Doria's argument at pp. 6-9 of its brief against granting the writ is nothing more than a review, from its partisan standpoint, of selected excerpts of testimony in the administrative hearing. In the process, Doria misstates certain testimony, *e.g.*, of the Petitioners' witness Mr. Ed Curtin, and even misstates the holding of the Ninth Circuit Court of Appeals. The holding of the Ninth Circuit quoted at page 6 of Doria's brief, was not reached by that Court after a review of the entire administrative record. Indeed, there is nothing in the opinion of the Ninth Circuit which indicates that the Court undertook to review the entire record in passing on Doria's contentions of error. Petitioners sought a rehearing in the Ninth Circuit based on the very contention urged before this Court, *i.e.*, that considering the evidence as a whole as summarized in the IBLA decision, there was no showing that the "tainted" Exhibit 14-A infected the decision or precluded the agency from thoroughly examining the dispositive issue of whether discoveries of valuable mineral deposits existed within the Doria claims. In this connection, petitioners relied by analogy on the doctrine of nonprejudicial error embodied in the last sentence of

Title 5, U.S.C. §706 which provides that the Court in reviewing agency action:

> ". . . shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error."

Petitioners would further point out that Doria's argument at pp. 7-8 of its brief regarding continuous marketability of its deposits during 1953-1967 is based on a complete non-sequitur. Merely because the Barstow deposits controlled by Owl Rock operated continuously during this time frame and served the Victorville market, which market was also served by the Oro Grande deposits controlled by Mr. Thwing's company, did not mean that Owl Rock could not survive without sales in Victorville. If Doria had attempted to serve the Victorville market, during the 1953-1967 time frame, however, Doria would have been a direct competitor of the Oro Grande and Owl Rock facilities and would have been hampered by the distance and mileage differential of Oro Grande. In addition, Doria overlooks the very limited demand factor during this time frame. As Doria's own expert, Mr. Longfield, explained:

> ". . . Victorville was doing very little, very little market in Victorville until 1965. There was some roadwork and some activity in the Hesperia-Apple Valley area, but these were marginal although there were operators operating up there which certainly constituted a market."

As Mr. Longfield further explained, Doria in the fifties faced the problem of having to interest governmental agencies such as the State and counties in material which was marginal in its specifications and "without

the ability to sell this material on State work it was obvious that a substantial portion you market [sic] from Summit to Victorville . . . would vanish." (RAH 1238.)

Doria, at page 7 of its brief, is bold enough to assert that Petitioners failed to establish a prima facie case regarding the lack of continuous marketability of the subject mining claims. However, the decision of the IBLA in summarizing the testimony of all witnesses adequately refutes Doria's overreaching contention. In any event, the time has long since passed to reargue the weight and sufficiency of the evidence adduced at the validity hearing.

At page 9 Doria also asserts that the plans of Owl Rock to mine the Doria deposits impeached Mr. Schroter's testimony showing the Doria materials as "worthless." To the contrary, Mr. Curtin's testimony corroborated Schroter's evaluation of the quality of the deposits. Mr. Curtin testified that after Owl Rock took an option for a lease agreement with Doria, the company bid all the general contractors for supplying Class No. 2 (not concrete) aggregates, but was unsuccessful in getting any contracts. Thereafter, the option agreement lapsed by its own terms. (RAH 456-457.) Further, in Mr. Curtin's opinion, Owl Rock would *not* have considered the Doria deposits as a feasible site for a commercial aggregate operation. (RAH 458.) This testimony, together with Mr. Longfield's evaluation, confirmed, contrary to Doria's contention, the lack of continuous marketability of the Doria claims.

Doria further asserts that Petitioners fabricated the test results because the investigation of Petitioners' experts disclosed that the deposits satisfied the market-

ability test during the years 1953-1973 (Brief, pp. 8-9). The assertion lacks both accuracy and logic.

Firstly, the investigation of Petitioners' experts Schroter and Thwing regarding the state of the sand and gravel market in the San Bernardino-Victorville area during the relevant time periods wholly belies Doria's contention regarding marketability. See Petition, Appendix "C," IBLA opinion, pp. 27-28. Secondly, logic dictated that the Doria deposits be tested to determine the quality of the material as compared with other deposits in the very limited market which existed in the area of the claims during the fifties and sixties. If, for example, the tests showed high quality material, this would have enhanced Doria's position as a potential competitor even in a limited market. The claims were thus sampled to ascertain whether the material qualified as a "valuable mineral deposit" in the first place, for Petitioners were not prepared to concede to Doria any aspect of validity of the claims.

Doria concludes with a series of gross misstatements —*e.g.*, that Owl Rock negotiated a lease for "1,000,000 metric tons"; and that over 1,000,000 tons of material on the Doria claims were used for the new freeway (I-15) and that the old State highway was built from Doria materials. Each of these assertions is unsupported by the agency record. In fact, Owl Rock's option was initially for 500,000 tons for a three-year period, with an option to renew for another 500,000 tons. (RAH 450.) No one testified in the hearing as to what material was used from the claims to build I-15, much less the amount thereof. With respect to the old highway, Exhibit 16-B introduced by Petitioners at the hearing showed that borrow sites for that project were in fact off the area of the claims.

Conclusion.

Doria's Opposition manifests the improvident result of the Judgment of the Ninth Circuit Court of Appeals. By claiming "foul" as to one item of evidence, Doria passes easily to a review and criticism of other evidence in the agency record, with the result that a *de novo* trial of the entire proceedings is inevitable. This result is not contemplated by the limited scope of agency review conferred on the Courts by Title 5 U.S.C. §706.

Certiorari is essential to guide the Courts below as to appropriate action in the face of allegations of fraud where, as in the instant case, the agency decision is not affected by the claimed fraud.

Respectfully submitted,

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